

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES S. RUSS,

Plaintiff-Appellant,

v

CITY OF TROY and LAWRENCE R. CAREY,

Defendants-Appellees.

UNPUBLISHED

April 6, 2001

No. 217921

Oakland Circuit Court

LC No. 98-005525-NZ

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting summary disposition in favor of defendants under MCR 2.116(C)(10) in this marital status discrimination case. We reverse and remand.

Plaintiff is a police officer with defendant city of Troy and has been such since March 1981. Defendant Lawrence Carey was the Chief of Police for Troy from 1969 until January 1998. Plaintiff has attempted, unsuccessfully, to be promoted to a police sergeant. The specific period that plaintiff here challenges is when he appeared on a certified eligibility list from November 15, 1994, until that list expired on December 6, 1996. That list certified twenty-one police officers as eligible for promotion to sergeant and plaintiff was ranked number six on that list. For the period ending on December 6, 1996, nine of the top ten candidates were promoted to sergeant and plaintiff was the one candidate in the top ten who was not promoted. Four of the candidates were ranked lower than plaintiff on the eligibility list.

Plaintiff alleges that he was not promoted because of marital status discrimination, in contravention of the Civil Rights Act, MCL 37.2201 *et seq.*; MSA 3.548(201) *et seq.* Plaintiff was previously married, but divorced in 1988. In his answers to interrogatories and in his deposition, plaintiff avers that in 1989, when plaintiff also sought a promotion to sergeant, defendant Carey told plaintiff that he was considered to be unfit for duty because of his marital status and divorce. More importantly, plaintiff testified in his deposition that in December 1994, at a holiday party for police personnel, defendant Carey told plaintiff that he (Carey) was not going to promote plaintiff unless he was married. Although defendant Carey denied making that particular statement, he admitted at his deposition that in responding to plaintiff's question concerning whether he would be promoted if he got married, defendant Carey told plaintiff that "we look at married men favorably." Defendants contend that plaintiff was not promoted, not

because of his marital status, but because on July 28, 1995, a citizen's complaint was filed against plaintiff for allegedly making inappropriate comments to her while plaintiff was on duty. Plaintiff later received a written reprimand on September 13, 1995, arising out of this incident. According to defendant Carey, he did not recommend plaintiff for promotion to sergeant to the city manager because of this reprimand.

The trial court granted summary disposition in favor of defendants under MCR 2.116(C)(10), finding that plaintiff failed to establish a prima facie case of marital status discrimination and that there was no evidence of intentional discrimination by defendants. A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim, and is subject to de novo review. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 537; ___ NW2d ___ (2001).

We note at the outset that the parties and the trial court utilized the burden-shifting analysis that is often applied in employment discrimination cases; however, based on plaintiff's evidence this case does not require utilization of the burden-shifting analysis because plaintiff has set forth direct evidence of unlawful marital status discrimination. See *id.*, pp 537-539. In this case, plaintiff testified at his deposition that in December 1994, shortly before the promotions to sergeant were made¹, defendant Carey told him that he would not promote him unless he was married. Further, defendant Carey recalled making a statement in regard to promotions that "we look at married men favorably." Consequently, because there is evidence of direct discrimination, made at a time when plaintiff was on the eligibility list, consideration of the burden-shifting analysis is inapplicable. *Id.*, pp 539-540; *Harrison v Olde Financial Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997). Thus, this case proceeds as an ordinary civil matter. *DeBrow, supra*, p 540.

As stated by our Supreme Court, when reviewing a motion under MCR 2.116(C)(10), the appellate court must consider the documentary evidence presented to the trial court in a light most favorable to the nonmoving party. *DeBrow, supra*, pp 538-539. Further, courts cannot make factual findings or weigh the credibility of the evidence presented when ruling on such a motion. *Id.*, p 540; *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). As stated in *Lytle, supra*, p 176:

[I]n the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.

In the present case, plaintiff testified at his deposition that defendant Carey told him in December 1994, while plaintiff was on the eligibility list for promotion to sergeant, that he would not promote him unless he was married. This statement is direct evidence of marital status discrimination and was made when plaintiff was on the eligibility list for promotion; thus, it

¹ The first promotion was offered on April 13, 1995, and the final promotion was offered on November 30, 1996.

bears directly on the intent with which plaintiff's employer acted in choosing not to promote him. See, e.g., *DeBrow*, *supra*, p 540. This statement allegedly made by defendant Carey, if believed by a reasonable trier of fact, is certainly sufficient for the trier of fact to conclude that discrimination was a motivating factor for the adverse action of not promoting plaintiff by defendants.

The arguments advanced by defendants, and as accepted by the trial court, do not compel a different result. Defendants' assertion that plaintiff is not a member of the protected class, which defendants assert are people who are unmarried, because plaintiff was living with and engaged to his fiancée at the time that defendant Carey allegedly made the remark to plaintiff is completely devoid of factual and legal merit. First, as a factual matter, plaintiff was unmarried. Defendants' statement that plaintiff was "for all practical purposes" not single because he was living with and engaged to his fiancée is obviously not legally correct.² Moreover, there is no "protected class" of married or unmarried people. As our Supreme Court has made clear, marital status itself is the protected class and discrimination is prohibited based on whether a person is married. *Miller v C A Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984); see also, *Fonseca v Michigan State Univ*, 214 Mich App 28, 32; 542 NW2d 273 (1995). Consequently, plaintiff's marital status, that being unmarried in this case, is protected by the Civil Rights Act.

Further, the trial court relied heavily on the fact, as advanced by defendants, that both married and unmarried police officers were promoted from the eligibility list. However, the question here is whether defendants discriminated against this plaintiff based on his marital status. As stated by the United States Supreme Court in *O'Connor v Consolidated Coin Caterers Corp*, 517 US 308; 116 S Ct 1307; 134 L Ed 2d 433 (1996), and reiterated by our Supreme Court in *DeBrow*, *supra*, p 540, n3, discrimination laws protect persons, not classes.

The trial court and defendants also emphasize that defendant Carey made only one comment in reference to plaintiff's marital status. In the context of this case, that comment is direct evidence of marital status discrimination made at a time when plaintiff was eligible for promotion. In *Debrow*, the Court similarly rejected the defendant's argument that the disputed statement regarding alleged age discrimination was a "stray remark" that could not subject the defendant to liability. Instead, the Court held that the trier of fact would have to determine the ultimate meaning of the remark. See *id.*, p 541. There is no number of statements that a defendant must make before being subject to liability. Here, plaintiff has presented direct evidence of discrimination.

Defendants also contend, and the trial court accepted, that defendant Carey was not involved in the final decision regarding promotions and there is no proof that the ultimate decisionmaker, the city manager, had any bias.³ Defendant Carey, however, was a decisionmaker

² Defendant's argument in this regard is that the "period during which a man is engaged to a woman is biblically characterized as a betrothal" and "[f]rom the time of the betrothal, the woman is regarded as the lawful wife of the man to whom she is betrothed."

³ Defendants' argument in this regard is at least somewhat refuted by defendant Carey's own statement at his deposition that "we look at married men favorably." (Emphasis added).

directly involved in reviewing and recommending candidates for promotion to sergeant. It appears from the record that if defendant Carey did not recommend a candidate, that candidate would not be selected for promotion by the city manager. Thus, we do not believe that defendant Carey's alleged remark to plaintiff can be insulated from liability.

Accordingly, we conclude that the trial court erred in granting summary disposition to defendants under MCR 2.116(C)(10). Here, there is a clear factual dispute as to the reason for plaintiff not being promoted to sergeant. Plaintiff contends that he was not promoted because of marital status discrimination and presented direct evidence of such discrimination by defendant Carey. Defendants contend that plaintiff was not promoted because of a written reprimand he received while being eligible for promotion. The trier of fact will have to determine whether marital status was a motivating factor in the ultimate decision to not promote plaintiff.

Reversed and remanded for further proceedings. Jurisdiction is not retained.

/s/ Janet T. Neff

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen